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IN THE

Supreme Court of the United States

October Term, 1972
No. 1520

PHILLIP BURROUGHS, *et al.*,

Petitioners,

vs.

STERLING TRANSIT COMPANY, a California corporation, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondent T.I.M.E.-DC, Inc. in Opposition.

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Counter-Statement of Questions Presented.

1. Did the courts below properly decide that the District Court had no jurisdiction to permit the filing of an out-of-time appeal in a civil matter?

2. Were the courts below precluded from applying the mandatory, jurisdictional time limits for appeals in civil matters by the Petitioners' contention that the due process clause of the Fifth Amendment guarantees plaintiffs in civil actions the same right to the effective assistance of counsel as is guaranteed under the Sixth Amendment to defendants in criminal prosecutions?

Constitutional Provisions, Statute and Rules Involved.

The relevant portions of the Fifth and Sixth Amendments to the Constitution of the United States, the Judicial Code, 28 USC Section 2107, and the Federal Rules of Appellate Procedure, Rules 4(a) and 26(b) are set forth below:

Fifth Amendment

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. Section 2107

Time for appeal to court of appeals. Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

Rule 4(a), Federal Rules of Appellate Procedure

Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a

controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from . . . .

* * *

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Rule 26(b), Federal Rules of Appellate Procedure

Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.

Statement of the Case.

On May 17, 1971, the motion of Respondent T.I.M.E.-DC, INC. for summary judgment and dismissal of Petitioners' complaint with prejudice was granted by the United States District Court for the Cen-

tral District of California [R 7:17-8:14].[1] Judgment was entered on the court's docket on May 18, 1971 [R 9]. On May 19, 1971, the clerk of the district court served notice of the entry of judgment on the Petitioners' attorney of record [*Ibid.*].

On June 19, 1972, more than a year after final judgment, Petitioners moved the district court for permission to file an out-of-time notice of appeal [R 28-29]. Said motion was denied by the district court on the ground that the court had no jurisdiction to permit the filing of such an out-of-time appeal [R 77-78]. Notice of the order denying Petitioners' motion was served on all parties on August 25, 1972 [R 81-82].

On September 11, 1972, Petitioners served notice of appeal from the district court's order denying their motion to permit the out-of-time filing of a notice of appeal from the judgment of May 17, 1971 [R 88-90]. On April 10, 1973, the United States Court of Appeals for the Ninth Circuit affirmed the district court's order on the ground that under Rules 4(a) and 26(b) the court had no jurisdiction to permit the filing of a notice of appeal over one year after entry of final judgment (Petition For Certiorari, App. A).

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[1]"R" refers to the Record. Page numbers precede the colon and line numbers follow.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

Preliminary Statement.

The questions presented in the Petition (Petition For Certiorari, p. 3) are clearly not cognizable under Rule 19 of this Court. There is no reason for this Court to grant a writ of certiorari to review the question of whether the lower court did or did not "abuse its discretion" in denying Petitioners permission to file an out-of-time notice of appeal. Likewise there is no reason for this Court to review the factual question whether the conduct of Petitioners' trial counsel constituted "excusable neglect".

As will be demonstrated below the decisions below are consistent with the decisions of this Court and every Court of Appeals with respect to the jurisdictional nature of the time limits for filing a notice of appeal in civil matters. Lastly, there is simply no need for this Court to consider the contention that the due process clause of the Fifth Amendment guarantees the plaintiffs in a civil action the same right to the effective assistance of counsel that is afforded to defendants in criminal prosecutions by virtue of the mandate of the Sixth Amendment.

II.

The Decisions of the Courts Below Holding That the Time Limits for Filing an Appeal in a Civil Action Are Jurisdictional, Are Consistent With the Decisions of This Court and All of the Courts of Appeals Which Have Considered This Question.

Under 28 U.S.C. Section 2107 and Rule 4(a) of the Federal Rules of Appellate Procedure, a notice of appeal must be filed within thirty days from the entry of judgment or within an additional thirty days if the district court finds that excusable neglect has been shown. Rule 26(b) of the Federal Rules of Appellate Procedure provides that the court may not enlarge the time for filing a notice of appeal.

The decisions of the courts below holding that these time limits are mandatory and jurisdictional are in accord with the decisions of every Court of Appeals which decided this issue. *Schaefer v. National Bank of Lincolnwood,* 465 F.2d 234, 236 (7th Cir., 1972); *Torockio v. Chamberlain Mfg. Co.,* 456 F.2d 1084, 1085 (3rd Cir., 1972); *Lathrop v. Okalhoma City Housing Authority,* 438 F.2d 914 (10th Cir., 1971); *Gulf-Tampa Drydock Co. v. Vessel "Virginia Trader",* 435 F.2d 150, 151 (5th Cir., 1970); *Levisa Stone Corp. v. Elkhorn Stone Co.,* 411 F.2d 1208 (6th Cir., 1969), cert. den. 397 U.S. 925 (1970); *Winchell v. Lortscher,* 377 F.2d 247, 251 (8th Cir., 1067); *Edwards v. Doctors Hospital,* 242 F.2d 888, 890-891 (2nd Cir., 1957), cert. denied, 356 U.S. 930.

These decisions are consistent with the dictates of this Court in *United States v. Robinson,* 361 U.S. 220 (1960). In that case, this Court stated that the time limit under former Rule 6(b) of the Federal Rules of

Civil Procedure which governed the filing of a notice of appeal "was mandatory and jurisdictional and could not be extended regardless of excuse." *Id.* at 229.

Petitioners have failed to demonstrate any need for further review of this issue in this case. The cases cited by Petitioners involved the discretionary time limits on petitions for certiorari in *criminal* cases under this Court's own Rule 22(2) [Petition For Certiorari, p. 8]. The distinction between the nonjurisdictional time limits set by this Court in its own rules and the time limits set by Act of Congress was specifically noted by this Court in *Schacht v. United States,* 398 U.S. 58 (1970), as follows:

> "Rule 22(2) contains no language that calls for so harsh an interpretation, and it must be remembered that *this rule was not enacted by Congress* but was promulgated by this Court under authority of Congress to prescribe rules concerning the time limitations for taking appeals and applying for certiorari in criminal cases. See 18 U.S.C. §3772; Rule 37, Fed. Rules Crim. Proc. *The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional* and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64 [Emphasis added].

By contrast, the time limits for petitions for certiorari in *civil* cases have been prescribed by Congress in 28 U.S.C. Section 2101(c) (just as Congress has prescribed time limits for the filing of an appeal in 28 U.S.C. Section 2107), and this Court has held that where Congressional time limits on certiorari are exceeded, "[t]his deprives us of jurisdiction to consider the merits of the

decree. . . ." *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923). *Accord: Department of Banking of Nebraska v. Pink*, 317 U.S. 264, 268 (1942); *Monks v. Lee*, 317 U.S. 590 (1942); *Bunn v. Atlanta*, 317 U.S. 666 (1942).

In short the decisions below are consistent with the above cited decisions of this Court and the Courts of Appeals in civil cases and there is no need for further review in this case.

III.

Petitioners' Contention That They Should Be Guaranteed the Effective Assistance of Counsel in Prosecuting Their Civil Action Borders on the Frivolous and Need Not Be Considered by This Court.

Petitioners contend that plaintiffs in civil actions should be entitled to the same guarantee of the effective assistance of counsel as defendants in criminal actions. Petitioners cite no authority for such a Constitutional guarantee in civil proceedings.

Such a contention borders on the frivolous. The Sixth Amendment which establishes the right to the assistance of counsel, by its own language, applies only to defendants in criminal prosecutions and the cases cited by Petitioners so hold (Petition for Certiorari, p. 10).

Moreover, this Court long ago made it clear that the right of appeal in federal civil cases is not essential to due process of law. *Luckenbach Steamship Co. v. United States*, 272 U.S. 533 (1926). Thus the right of appeal in a case such as this is a "matter of grace" and is available only to the extent granted by Congress. *Id.* at 536-7. Petitioners herein have admittedly failed to comply with the jurisdictional time limits prescribed

by Congress and their attempt to avoid these time limits under the guise of the Fifth Amendment is transparent.

Petitioners have failed to raise any Constitutional issue for review by this Court.

Conclusion.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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